1958

State of Utah v. Angelo Joe Tellay : Brief of Respondent

Utah Supreme Court

E. R. Callister; Gary L. Theurer; Attorneys for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

— vs. —

ANGELO JOE TELLAY,
Defendant and Appellant.

Case
No. 8731

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

On February 20, 1957, defendant was convicted of burglary in the second degree in the Third Judicial District Court. He was sentenced to an indeterminate term in the State Penitentiary.

Respondent accepts the statement of facts as submitted in defendant's brief. There is also presented hereinafter in this brief the basic facts as proved at trial.

STATEMENT OF POINTS

Point I.

THE EVIDENCE WAS SUFFICIENT TO CON-

VICT THE DEFENDANT OF THE CRIME OF BURGLARY IN THE SECOND DEGREE.

ARGUMENT

Point I.

THE EVIDENCE WAS SUFFICIENT TO CONVICT THE DEFENDANT OF THE CRIME OF BURGLARY IN THE SECOND DEGREE.

Section 76-9-3, U.C.A. 1953, defines the offense of second degree burglary.

> Every person who, in the nighttime, forcibly breaks and enters, or without force enters an open door, window or other aperture of, any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, or any tent, vessel, water craft, railroad car, automobile, automobile trailer, aeroplane or aircraft with intent to commit larceny or any felony, is guilty of burglary in the second degree. * * *

The offense of second degree burglary includes the element of intent and defendant's appeal is directed solely to that element, viz., whether there was sufficient evidence to prove that defendant committed the acts alleged with "* * * intent to commit larceny or any felony, * * *."

We have no substantial disagreement with appellant on matters of law. In a criminal conviction, each element of an offense, including that of intent, must be proved beyond a reasonable doubt. *State* v. *Clark* (Utah), 223 P. 2d 184. The issue here concerns itself with the proof of intent. It is a general rule that intent, being a

state of mind, is rarely susceptible of direct proof and must, therefore, be proved by circumstantial evidence. 9 Am. Jur. 271, Burglary, Sec. 61 and 12 C.J.S. 731, Burglary, Sec. 55. In *State* v. *Woodruff* (1929), 225 N.W. 254, an Iowa case, the defendant was apprehended inside a dwelling house at night. It did not appear that he had taken any property. He made no explanation as to the reason for his presence in the house. On an appeal by the State from a directed verdict for the defendant, the Appellate Court reversed. The Court said:

> The general rule is that in the absence of explanation, the jury may infer from the fact of his breaking and entering that his intent was to commit larceny. In ascertaining the intent, the jury may take into consideration all the other facts and circumstances disclosed by the evidence, and bearing upon that question.

See also *State* v. *Maxwell,* 42 Iowa 211.

In *Alexander* v. *State* (Texas), 20 S.W. 756, it was said:

> Although there was no direct evidence of the intent, it might be inferred from the surrounding circumstances. The weight to be given these was a question properly left to the jury; and when a person enters a building through a window at a late hour of the night, after the lights are extinguished, and no explanation is given of his intent, it may well be inferred that his purpose was to commit larceny, such being the usual intent under such circumstances.

See also *Vickery* v. *State* (1911 Texas), 137 S.W. 687.

In a very recent Idaho case, the court commented on the proof of intent in a burglary prosecution. *Ex Parte Seyfried* (1953 Idaho), 264 P. 2d 685. A conviction for burglary was taken to the Idaho Supreme Court on a writ of habeas corpus. The defendant had been apprehended at night in the dwelling house of another by police officers. He had taken no property when apprehended. He made no explanation of his presence in the house. The court held that the magistrate was justified in committing the defendant for trial and the order quashing the writ and remanding the defendant was affirmed. The court said:

> Where a dwelling house is broken and entered in the nighttime and no lawful motive or purpose is shown or appears, or any satisfactory or reasonable explanation given for such breaking and entering, the presumption arises that the breaking and entering were accomplished with the intent to commit larceny. The fact that the officers were present and apprehended the burglar before he had an opportunity to carry his purpose into execution is of no importance. The crime of burglary was consummated when the unlawful entry was made with intent to steal or commit some felony therein. Sec. 18-1401, I.C.
>
> The common experiences of mankind raise a strong presumption and inference that such a breaking and entering as is here shown was made with the purpose of committing larceny, no other purpose appearing. It is sufficient to show the essential unlawful intent when the entry was made by circumstantial evidence. Direct evidence of such intent is not required. One's intent may be proved by his acts and conduct, and such is the usual and customary mode of proving intent. * * *

In an old Utah case, *People* v. *Morton,* 1886, 11 P. 512, this court held that where the facts are such that it is impossible to account for the presence of the defendant in the place where he was arrested, unless on the hypothesis that he was there to commit larceny, a conviction of burglary is justified.

With the foregoing rules in mind, we proceed to consider appellant's contention, which will be discussed in two phases, first, since the evidence is largely circumstantial, does that circumstantial evidence prove intent and, second, was there evidence that defendant was intoxicated to the extent that he could not form the requisite intent?

There was sufficient proof of defendant's intent as required by the statute. There was no direct proof of intent, as is the usual case in burglary prosecutions, but the basic circumstantial evidence as proved raises the presumption of intent. That presumption was not rebutted at the trial. The following facts were proved:

(1) That a window was broken out of the building (a foundry business building) on the night of the entry.

(2) That police officers, called to the scene by a night watchman, heard a pounding noise on the inside of a set of double doors and afterwards, upon inspection, it was found that the locks to the doors had been broken.

(3) That almost immediately after the pounding noise ceased the defendant climbed out of the broken window space.

(4) That the entry occurred at night, at about 10:30 p.m.

(5) That defendant had no permission to enter the building.

(6) That no explanation was made as to the reason for defendant's presence in the building.

(7) That defendant, when apprehended, had apparently taken no property.

In addition to the above, the defendant made certain admissions tending to show a felonious intent. (See pages 71, 72 and 79 of the Trial Record.) Officer Clayton testified that "——Tellay; he stated that he was sorry that the other guys got messed up. Then he asked the girl why she didn't take off——." "——and she says that she didn't want to leave him there to take the rap, and he says, well, you should have;". "Then, he asked why she didn't let him know the police were there ahead of time, * * *." See Trial Record, pages 71 and 72. Officer Kenneth Peck testified that at the jail, after booking the defendant, the latter asked him why the rest of them had to be arrested, that it wasn't any of their doings, it was just him. See Trial Record, page 79.

There was no evidence submitted to show that defendant was so intoxicated that he was incapable of form-

ing an intent to commit larceny or another felony. Three police officers who were on the scene and who apprehended the defendant testified that in their opinion he was not drunk. They testified variously that he spoke "plainly" and did not have difficulty understanding; that his movements were steady and that he had "full capabilities." See Trial Record, pages 51, 57, 59, 60 and 71. One officer testified in fact that he could not tell that the defendant had been drinking. See Trial Record, page 59. There was testimony by witnesses for the defense that the defendant had been drinking but none of them stated that the defendant was intoxicated or drunk. Counsel for defendant laid great stress on the fact that the broken window space was small and that there was a certain amount of jagged glass remaining in it, and yet it was testified by several of the witnesses that they observed the defendant climb out of the window. This act obviously required a reasonable degree of agility and steadiness.

Considering the evidence adduced, there is no other reasonable hypothesis which the jury could have found. No explanation was made why defendant was in this building at a late hour. Appellant, in his conclusion, suggests four hypotheses, any of which he claims might account for defendant's actions. Under the facts of the case they are not reasonable, nor were they suggested by the evidence at trial. First, a person would not reasonably break a window and climb into a strange building merely for the purpose of escaping his wife, even supposing a wife of such annoying and dangerous characteristics. Why not run from her or hide in less difficult

seclusion? It is noted that one of the defendant's witnesses, in fact, testified that when last seen by her, defendant was chasing his wife. See Trial Record, page 92. The hypothesis and the evidence are not consistent. There was other evidence that the wife had on previous occasions called the police because of defendant's conduct. This certainly does not seem consistent with a theory that the husband was running to escape the wife. Second, again there was no evidence that defendant was intoxicated. Third, there was no evidence that the defendant desired to seclude himself from the rest of the party as is suggested, and even if so, why pick such a difficult and unusual hiding place? Fourth, if defendant desired to use a toilet, a circumstance about which nothing was said at the trial, why break a window and climb into a strange building? It was night and it would seem that a person could more easily seclude himself for such a temporary necessity.

CONCLUSION

It is respectfully submitted that the judgment of the trial court should be affirmed.

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